83-72

CASE NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHARLES W. BRUNTY, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

A. THOMAS MIHOK, ESQ.
DEMPSEY & SLAUGHTER, P.A.
Suite 610, Day Building
605 E. Robinson Street
Post Office Box 1980
Orlando, Florida 32802
(305) 422-5166

Attorneys for Petitioner,
CHARLES W. BRUNTY

CASE NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHARLES W. BRUNTY, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

A. THOMAS MIHOK, ESQ.
DEMPSEY & SLAUGHTER, P.A.
Suite 610, Day Building
605 E. Robinson Street
Post Office Box 1980
Orlando, Florida 32802
(305) 422-5166

Attorneys for Petitioner,
CHARLES W. BRUNTY

QUESTIONS PRESENTED

1. Does the federal distribution statute, 21 U.S.C. §841(a)(1), establish a continuing offense which begins when preliminary arrangements are made for the delivery of a controlled substance and continues so long as an individual expects payment for such delivery?

2. Is possession of a controlled substance an essential element of the distribution offense established by 21 U.S.C. §841(a)(1)?

3. Does constructive possession of a controlled substance arise solely from technical notions of ownership in the sense that an individual theoretically could maintain a cause of action for the purchase price of drugs absent an actual ability to exercise dominion over the drugs and to control their disposition?

4. Does constructive possession of a controlled substance arise when an individual takes steps to gain or retain control over drugs absent an actual ability to exercise dominion over the drugs and to control their disposition?

PARTIES

The parties to the proceedings in the court whose judgment is sought to be reviewed are as follows:

CHARLES W. BRUNTY

UNITED STATES DEPARTMENT OF JUSTICE

TABLE OF CONTENTS

Table of Contents, Cont'd.

TABLE OF AUTHORITIES

Table of Authorities, Cont'd.

CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHARLES W. BRUNTY, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The Petitioner, CHARLES W. BRUNTY, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in his case on April 4, 1983.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, not yet reported, appears in the appendix hereto. No opinion was rendered by the District Court for the Middle District of Florida.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on April 4, 1983. The Eleventh Circuit denied a timely petition for rehearing on May 18, 1983, and this petition for a writ of certiorari was filed within sixty (60) days of that date as required by Rule 20 of the Revised Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

21 U.S.C. §841. Prohibited acts A.

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; ...

21 U.S.C. §802. Definitions.

(8) The terms "deliver" or "delivery" mean the actual, constructive, or attempted transfer of a controlled substance, whether or not there exists an agency relationship.

(11) The term "distribute" means to deliver (other than by administering or dispensing) a controlled substance. The term "distributor" means a person who so delivers a controlled substance.

STATEMENT OF CASE

This petition arises from CHARLES W. BRUNTY's convictions in the United States District Court for the Middle District of Florida for conspiracy to distribute marijuana in violation of 21 U.S.C. §846 and for distribution of marijuana in violation of 21 U.S.C. §841 (a)(1). The issues raised in this petition relate solely to BRUNTY's conviction for the substantive distribution offense.

The record at trial reflects that BRUNTY, in the territory of the Middle District of Florida, made arrangements with various undercover government agents to sell a quantity of marijuana which was stored in the Southern District of Florida. The undercover agents were to be the ultimate purchasers of the marijuana and no agency relationship existed between BRUNTY and the agents.

Pursuant to the preliminary arrange-

ments, BRUNTY drove by car to the Southern District followed by an undercover agent driving a government-owned van. A quantity of marijuana was loaded into the government van in the Southern District and BRUNTY, followed by the government van, began the return trip to a location in the Middle District where the agents were to tender payment for the marijuana. Two brief stops were made in the Southern District, one at a restaurant and the other at a department store, and a third stop was made at an unspecified location to pump gasoline into the government van, which was pumped by BRUNTY. At all times during this return trip, the doors of the government van containing the marijuana were locked and the van was driven by an armed government agent. The only keys to the van were at all times in the exclusive possession of the agent driving the van, who followed the car driven by BRUNTY

to the prearranged location for payment in the Middle District. Upon arriving at that location, BRUNTY was arrested.

A three count indictment was subsequently filed against BRUNTY in the Middle District of Florida. Count one charged BRUNTY with conspiracy to distribute marijuana. Count two charged BRUNTY with possession of marijuana with intent to distribute. Count three charged BRUNTY with distribution of marijuana. The second count of the indictment was dismissed by the district court prior to trial and BRUNTY proceeded to trial in the Middle District of Florida on counts one and three.

At the conclusion of the government's case-in-chief, BRUNTY filed a motion for judgment of acquittal on the distribution charge on the ground that venue in the Middle District of Florida had been improper because the

government's evidence failed to establish distribution of marijuana in the Middle District. BRUNTY renewed this motion at the close of all the evidence. On both occasions the trial court denied the motion and BRUNTY was convicted for conspiracy and distribution.

The venue issue arising from the distribution conviction was appealed to the Eleventh Circuit, which affirmed BRUNTY's conviction on three independent grounds. First, the Eleventh Circuit ruled that the federal distribution statute, 21 U.S.C. §841(a)(1), established a continuing offense which begins when "preliminary arrangements" are made for the delivery of drugs and continues so long as an individual "expects payment" for previously delivered drugs. Possession of a controlled substance, the Eleventh Circuit ruled, is not an essential element of distribution. Since BRUNTY had made preliminary arrangements in

the Middle District to deliver marijuana, and since BRUNTY subsequently had been present in the Middle District expecting payment for the marijuana previously delivered in the Southern District, the Eleventh Circuit held that venue in the Middle District of Florida for the substantive distribution offense had been proper.

As an alternative to its interpretation of distribution as a continuing offense, the Eleventh Circuit held that BRUNTY had retained constructive possession of the marijuana throughout the return trip to the situs of payment in the Middle District and that BRUNTY had attempted to transfer this constructive possession at said situs, thereby violating the distribution statute.[1] Since

---

[1] 21 U.S.C. §802(8) provides that an attempted transfer of possession constitutes a substantive distribution offense under 21 U.S.C. §841(a)(1).

the evidence at trial had established that at all times in the Middle District the government van containing the marijuana had been locked and driven by an armed government agent in exclusive possession of the van's keys, the Eleventh Circuit based its finding of constructive possession on two distinct rulings.

First, the Eleventh Circuit ruled that constructive possession of drugs may arise from the existence of a theoretical cause of action for the purchase price of previously delivered drugs even in the absence of an actual ability to exercise dominion over the drugs or to control their disposition. Concluding that BRUNTY had such a cause of action during his return trip to the Middle District, the Eleventh Circuit held that BRUNTY had attempted to transfer this constructive possession upon arrival at the payment situs therby making venue in the Middle District proper.

As a second ground supporting its finding that BRUNTY was in constructive possession of marijuana in the Middle District during his return trip from the Southern District, the Eleventh Circuit ruled that constructive possession of drugs is present when an individual takes "steps" intending to retain (or gain) control over drugs even in the absence of an actual ability to exercise dominion over the drugs or to control their disposition. Concluding that BRUNTY had taken various "steps" intending "to retain control over the marijuana" during the return trip in the Middle District, the Eleventh Circuit held that BRUNTY had attempted to transfer this constructive possession at the payment situs thereby making venue in the Middle District

proper.[2]

The Eleventh Circuit denied BRUNTY's timely petition for rehearing without opinion. These issues are now presented for this Court's review.

---

[2] The Eleventh Circuit described the "steps" taken by BRUNTY in an attempt to retain control over the marijuana at footnote 17 of the opinion. (See Appendix, p. A-26, n. 17). It is unclear what the Eleventh Circuit meant when stating that BRUNTY issued "numerous instructions" to the undercover agents. Though the parties discussed their travel plans, the law enforcement officers, in their undercover roles, were not BRUNTY's subordinates or agents so as to make them susceptible to BRUNTY's "instructions."

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 21 U.S.C. §841(a)(1) AND THE REQUIREMENTS OF CONSTRUCTIVE POSSESSION.

A. Distribution as a Continuing Offense.

The Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §841 (a)(1), provides that "it shall be unlawful for any person knowingly or intentionally -- to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance." The term "distribute" is defined by the Act as "deliver," and the term "deliver," in turn, is defined as "the actual, constructive or attempted transfer of a controlled substance, whether or not there exists an agency relationship." 21 U.S.C. §802(8) and (11).

The Eleventh Circuit, reasoning that

since "the operative term 'transfer' is nowhere qualified or limited by the phrase 'of possession,'" ruled that transferring possession of a controlled substance was not an essential element of the distribution offense. Since the actual, constructive or attempted transfer of possession is unnecessary to establish a violation of the distribution statute, the Eleventh Circuit held that BRUNTY's preliminary arrangements with the undercover agents in the Middle District and his subsequent presence in that district to collect the proceeds from the sale violated the statute and made venue in the Middle District proper.

The Eleventh Circuit's ruling that possession, or the transfer of possession, of a controlled substance was not an essential element of a "continuing" distribution offense conflicts with the Fifth Circuit's analysis in United States v. Jackson, 526 F.2d 1236, 1238

(5th Cir. 1976). In that case, the Fifth Circuit premised its analysis and ruling on what it considered the obvious conclusion that "possession is an element in the substantive charge of distribution or sale." See also United States v. Nichols, 401 F.Supp. 1377, 1387 (E.D. Mich. 1975) ("while possession is possible without distribution, distribution is not possible without possession").

The ruling below that possession is not an essential element of distribution also conflicts with the analyses in a multitude of cases where distribution convictions have been affirmed on the ground that a defendant aided and abetted the distribution of drugs. Without a single exception, the circuits deciding such cases premised the liability of the aider and abetter on the fact that another partici-

pant had transferred possession of drugs.[3] Since, according to the opinion below, possession is not essential to the substantive distribution offense, liability for aiding and abetting a distribution may arise absent such a transfer of possession by a participant in the offense. Thus, the opinion below conflicts with the voluminous case law of the various circuits concerning aiding and abetting distribution.

Though the precise issue in question has seldom been expressly addressed by the courts, the analyses employed by the courts in every case which has interpreted the distribu-

---

[3] See United States v. Pino, 608 F.2d 1001 (4th Cir. 1979); United States v. Harper, 579 F.2d 1235 (10th Cir.), cert. denied, 439 U.S. 968 (1978); United States v. Richman, 600 F.2d 286 (1st Cir. 1979). These cases are merely illustrative and do not comprise an exhaustive list of cases dealing with aiding and abetting distribution.

tion statute has implicitly and necessarily assumed that possession, or the transfer of possession, is an essential element of the distribution offense. Indeed, the obvious nature of this assumption has heretofore prevented serious consideration of the issue.

The conclusion that possession, or the transfer of possession, is an essential element of the distribution offense is grounded not only in the express wording of the Act, which prescribes "the actual, constructive or attempted transfer of a controlled substance," but also in the Act's clear legislative intent. The Act's legislative history reflects that Congress equated members of a "distribution chain" with "handlers" of controlled substances. 1970 U.S. Code, Cong. & Admin. News, pp. 4566-4572. Similarly, 21 U.S.C. §822(c), which exempts agents and carriers of registered drug distributors from criminal liabil-

ity under the distribution statute, expressly provides that those persons "may lawfully possess any controlled substance under this subchapter."

The Eleventh Circuit ignored the plain language of the statute as well as its obvious legislative intent by relying upon cases which had affirmed distribution convictions in instances where the defendant never had possession of a controlled substance. Those cases, however, merely held that an individual may be guilty of distribution absent actual or constructive possession of contraband if that individual aids and abets another to transfer possession of contraband. No case has ever held an individual liable for distribution unless a co-participant in the crime actually or constructively transferred or attempted to transfer possession of a controlled substance. Indeed, in every case cited by the Eleventh

Circuit, the courts relied upon an aiding and abetting theory merely to reach participants in drug transactions who, though never in actual or constructive possession of drugs, nevertheless acted to facilitate a drug transfer (i.e., purchasing agent, broker, messenger, etc.).

Though isolated quotations from the case law applying an aiding and abetting theory superficially conceal the conflict between the circuits, this illusion cannot withstand analysis. The principle is well-established that "a person cannot aid and abet himself in committing an offense, and that such person cannot be found guilty unless there is satisfactory evidence that another for whom he was acting was connected with the offense." United States v. Doughty, 460 F.2d 1360 (7th Cir. 1972); United States v. Horton, 180 F.2d 427 (7th Cir. 1950). "The law re-

quires a guilty principal," the Fifth Circuit has stressed, "before the aider and abetter can be punished." Edwards v. United States, 286 F.2d 681 (5th Cir. 1960). Thus, though BRUNTY's acts in the Middle District might be sufficient to convict an individual under the distribution statute on the theory that these acts aided and abetted the drug transfer in the Southern District, the fact that BRUNTY also was the principal who delivered the marijuana to the undercover agents in the Southern District precludes application of the aiding and abetting theory to expand the prosecution's available venue.

The Eleventh Circuit's departure from the interpretation of the distribution statute employed by other circuits becomes even more obvious when the case law discussing aiding and abetting distribution is analyzed in light of the distribution statute's legislative in-

tent. The cases relied upon by the Eleventh Circuit, consistent with the legislative intent of the Comprehensive Drug Abuse Prevention and Control Act of 1970, interpreted the distribution statute broadly to impose criminal liability upon individuals who, though not actually handling drugs, nevertheless participated in a drug transfer where associates made the actual delivery. Since the Act's legislative history reflects that Congress intended to reach all participants in drug transfers conducted outside the legitimate distribution chain, a broad construction of the distribution statute appears justified in order to bring all participants within the statute's purview. Accordingly, the courts have held that one who aids and abets a drug transfer is guilty of distribution.

The Act's legislative history, however, reflects that Congress was not concerned

with providing multiple forums for prosecuting the principal in distribution offenses. See U.S. Code, Cong. & Admin. News, p. 4566. Since the broad construction of the distribution statute adopted by the court below to expand venue has no basis in the statute's legislative history, there is no justification for straining the statute's plain language to provide multiple forums for prosecution. The case law cited by the Eleventh Circuit was concerned only with the liability of accomplices to distributions and not with venue for the principals, and those cases clearly premised the accomplices' liability upon possession by the principals. The opinion below dispenses with the element of possession in distribution offenses and thus creates a split between the circuits.

B. Constructive Possession as a Cause of Action for the Purchase Price of Drugs.

The second leg of the opinion below, the ruling that constructive possession may be based on a finding of an "ownership" interest in the sense that an individual theoretically can maintain a cause of action for the purchase price of a previously delivered controlled substance directly conflicts with the Seventh Circuit's ruling in United States v. Landry, 207 F.2d 425 (7th Cir. 1958). In Landry, the defendant, a heroin addict, owned a quantity of heroin which he gave to a companion so that the companion could control the defendant's access to the heroin to prevent him from using it "all at once." Id. at 431. Though, at the time of arrest, the heroin was in the companion's possession, the defendant was convicted for possession of heroin due to his ownership interest in the heroin. The

Seventh Circuit reversed the conviction, rejecting the government's arguments that constructive possession could be shown by proof of ownership with the following language:

> Ownership and possession of a thing, of course, may merge in the same person but, on the other hand, ownership may be in one person and possession in another.... Ownership is not proof of possession any more than possession is proof of ownership.... The same can be said of constructive possession or the unexercised right of possession.

Id. at 431.

Under the Eleventh Circuit's test for constructive possession, the conviction in Landry would have been affirmed due to the defendant's ownership interest in the heroin.

The opinion below disguises its departure from established principles of constructive possession by citing cases which employed legal notions of ownership merely as evidence of an actual ability to control the disposi-

tion of drugs. No reported case has ever based a finding of constructive possession upon technical notions of ownership. Close analysis of the case law reveals that the courts have used ownership as evidence of constructive possession only because ownership is normally indicative of control. Furthermore, the term "ownership," as traditionally used in the case law, refers only to legal title and not to the existence of a cause of action for the purchase price of drugs. Since a cause of action for the purchase price of goods, as contrasted with a cause of action for damages, normally arises only after an individual has divested himself of title and control over those goods, the existence of such a cause of action is evidence of the absence of title and possession instead of the converse.

C. Constructive Possession as Steps to Exercise Control Over Drugs.

The third facet of the Eleventh Circuit's opinion, the ruling that constructive possession may be based upon attempts to gain or retain control over a substance absent an actual ability to direct the disposition of that substance, conflicts with every other circuit that has ruled on the issue. Though at all times in the Middle District the marijuana in question had been stored in a locked government van driven by an armed government agent, the Eleventh Circuit nevertheless held that BRUNTY had constructive possession of the marijuana because BRUNTY "took steps to retain control over the marijuana."

The record reflects that BRUNTY at no time in the Middle District had the ability to exercise dominion and control, either directly or indirectly, over the marijuana or the van

in which it was stored. The Eleventh Circuit, however, held that BRUNTY's "steps" to retain control over the marijuana were sufficient to support his conviction for distribution on the theory that he had retained constructive possession of the marijuana and attempted to transfer that constructive possession in the Middle District. The test for constructive possession applied by every other circuit requires an actual ability to exercise dominion and control over a substance and not merely the taking of "steps" to gain or retain such control.

In United States v. Batimana, 623 F.2d 1366 (9th Cir.), cert. denied, 449 U.S. 1038 (1980), two men, Batimana and Noguera, and a third man, met a drug courier at an airport and then proceeded to a hotel room, where the courier delivered the drugs to the third man. The three men subsequently were charged with

possession of heroin with intent to distribute. On appeal, the Ninth Circuit reversed the convictions of Batimana and Noguera, rejecting the government's arguments that they were "minimally" in control of the heroin.

Though the evidence reflected that Batimana and Noguera were present in the hotel room when the courier delivered the heroin to the third defendant and that Batimana "tried to place his hand inside the bag" containing the heroin, the Ninth Circuit held that constructive possession was not present. Id. at 1369. Constructive possession, the Ninth Circuit stressed, is defined as dominion and control over a drug "so as to give power of disposal of the drug." Id. An individual in constructive possession of a drug must have the "ability to assure its production without difficulty...." Id. Under the Eleventh Circuit's test for constructive possession,

Batimana's conviction would have been affirmed because Batimana clearly attempted to gain control over the heroin when he "tried to place his hand inside the bag" containing the drug.

The Eleventh Circuit's ruling also conflicts directly with the Fifth Circuit opinion in United States v. Barrera, 547 F.2d 1250 (5th Cir. 1977). In Barrera, various undercover agents made contact with a "middle-man" in an open field to purchase heroin. After a brief meeting, one of the defendants drove a pick-up truck to a nearby ranch house in an attempt to obtain the heroin from the supplier. The supplier, however, had become suspicious and refused to tender the heroin. The driver of the pick-up truck was subsequently convicted of possession of heroin with intent to distribute.

The Fifth Circuit, ruling that con-

structive possession requires "the exercise of dominion or control over the proscribed substance," reversed the driver's conviction. Id. at 1255. "In short," the Fifth Circuit concluded, "there was no proof of possession, actual or constructive." Id. at 1256. Under the test announced by the Eleventh Circuit below, the driver of the pick-up truck would have been in constructive possession of the heroin because he had taken direct and overt steps to gain possession of the drug.

The opinion below also conflicts with the rulings of the Seventh, Ninth, and District of Columbia Circuits. In United States v. Holland, 445 F.2d 701 (D.D.C. 1971), the defendant was found by police hiding behind a bed in a bedroom where narcotics were located on top of a dresser and the defendant was convicted of receipt and concealment of narcotics. On appeal, the District of Columbia Cir-

cuit, stressing that "constructive possession means being in a position to exercise dominion and control over a thing," reversed the conviction because no evidence was presented reflecting that the defendant ever had the actual ability to control the disposition of the narcotics found on the dresser.

Similarly, in United States v. DiNovo, 523 F.2d 197 (7th Cir.), cert. denied, 423 U.S. 1016 (1975), federal agents discovered heroin in a trailer which the defendant shared with her husband and the defendant was convicted of possession of heroin with intent to distribute. "Constructive possession," the Seventh Circuit ruled, "means being in a position to exercise dominion and control over a thing." Since the government had failed to present evidence establishing that the defendant had the ability to exercise "dominion and control" of the heroin found in the trailer,

the Seventh Circuit reversed her conviction. See also Murray v. United States, 403 F.2d 694 (9th Cir. 1968) (reversing conviction for smuggling and concealing heroin where heroin was in the possession of defendant's brother where evidence did not support the inference that defendant's brother was under defendant's "direction and control" or that the defendant "could control the disposition of the heroin").

These conflicts justify the grant of certoriari to review the judgment below.

II. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE NATURE AND SCOPE OF THE FEDERAL DISTRIBUTION STATUTE AND THE PROPER APPLICATION OF THE CONSTRUCTIVE POSSESSION DOCTRINE.

A. Distribution as a Continuing Offense.

The Eleventh Circuit below ruled that the federal distribution statute, 21 U.S.C. §841(a)(1), establishes a broad, continuing offense which begins when preliminary arrange-

ments are made for delivery of a controlled substance and continues so long as any individual "expects payment" for a prior delivery. Venue for a distribution offense, the Eleventh Circuit reasoned, lies in any district where a participant was present during the continuation of the offense. Since BRUNTY had made preliminary arrangements with undercover agents in the Middle District of Florida for delivery of marijuana in the Southern District of Florida, and since BRUNTY had been present in the Middle District expecting payment for the prior delivery in the Southern District, the Eleventh Circuit held that venue in the Middle District was proper.

The Eleventh Circuit is the only circuit ever to interpret the distribution statute as establishing a continuing offense. Under the traditional view of distribution, accepted by all except the Eleventh Circuit,

the transfer of a controlled substance is the crucial act which triggers criminal liability. Such a transfer serves as a clear, "bright line" test essential to law enforcement agents in enforcing the distribution statute. The Eleventh Circuit's ruling eliminates this bright line test and instead imposes liability under the distribution statute for any of a series of discrete acts which, in some unspecified manner, are related to such a transfer.

Typically, the federal distribution statute is enforced through infiltration of an illicit drug distribution chain by undercover agents. In the course of a drug transaction, the exact point at which arrests may be made is a key concern. Under the traditional view of distribution, the bright line test of delivery clearly signalled the appropriate time for arrests and provided focus and coordination for undercover investigations. The

Eleventh Circuit's novel interpretation of the distribution statute, however, leaves no doubt that an arrest for a completed distribution offense may be made prior to the actual delivery. Indeed, under the Eleventh Circuit's view, delivery of a controlled substance is not an essential element of a distribution offense but merely a point of reference with which the criminality of acts related to such delivery may be ascertained. The Eleventh Circuit opinion provides no guidance as to the nature of this relationship beyond stating that making "preliminary arrangements" for delivery of a controlled substance triggers liability under the distribution statute.

Though the existence of various crimes sometimes cannot be determined without lengthy and detailed analysis of surrounding circumstances, this problem is exceptionally acute in the area of drug-related crimes. Unlike

crimes which can be analyzed by the prosecutor and investigating agents at their leisure prior to making arrests, enforcement of drug laws generally requires immediate, on the scene arrests. Armed only with the vague pronouncements of the Eleventh Circuit in this case, government agents are left guessing as to the appropriate time to disclose their identities and perform arrests. This uncertainty doubtlessly will lead to premature arrests and needless waste of law enforcement resources.

The Eleventh Circuit's ruling that a distribution offense continues so long as payment is expected for delivery of a controlled substance invites impermissible government manipulation of venue and creates serious ambiguities concerning the statute of limitations. In the typical drug investigation, undercover agents pose as drug buyers. These

"buyers" create and control the expectation of payment as well as the situs of payment. By manipulating these two variables, the government would be able to lay venue in a district unrelated to the delivered drugs and extend the limitations period on the basis of a subjective expectation beyond the period established by a defendant's acts.

The Eleventh Circuit's interpretation of the distribution statute also renders the statute unconstitutionally vague, gives rise to serious problems concerning double jeopardy, and creates paradoxes in construing the distribution statute together with related provisions. According to the Eleventh Circuit, mere "preliminary arrangements" for delivery of a controlled substance violate the distribution statute. Such "preliminary arrangements," however, normally form the basis of a conspiracy charge. In cases where a

defendant is charged both with conspiracy and with the substantive distribution offense, the Eleventh Circuit's ruling would allow the imposition of dual liability for the same acts in contravention of the Double Jeopardy Clause of the United States Constitution.[4]

Furthermore, under the Eleventh Circuit's interpretation of the distribution statute, a conspiracy prosecution pursuant to 21 U.S.C. §846 would be two steps removed from the substantive evil at which the statute is addressed -- the transfer of drugs. The basis of a conspiracy offense would be an agreement to make preliminary arrangements to transfer drugs, or, in essence, an agreement to agree to transfer drugs. Ultimately, this analysis

---

[4] It should be noted that BRUNTY was convicted for conspiracy as well as the substantive distribution offense.

unravels the Eleventh Circuit's ruling into paradox and confusion.

B. Constructive Possession as a Cause of Action for the Purchase Price of Drugs.

The second facet of the Eleventh Circuit's opinion, the ruling that constructive possession may be based upon legal ownership of drugs in the sense that a theoretical cause of action can be maintained for the purchase price of previously delivered drugs, also merits this Court's attention.[5] This ruling confounds the otherwise clear distinction be-

[5] A cause of action for the purchase price of goods, as opposed to a cause of action for damages arising from the breach of a sales agreement, generally arises only after the seller has relinquished to the buyer title and possession of the goods. Thus, though the opinion below equates such a cause of action with ownership and possession of goods, the existence of a cause of action for the purchase price of drugs indicates that the seller has been divested of ownership and control of the drugs.

tween legal and illegal involvement in the distribution of controlled substances.

The legal manufacturing and distribution of drugs within the closed distribution chains specified by the Comprehensive Drug Abuse Prevention and Control Act normally are financed by investors and shareholders who themselves are not licensed to handle the drugs. In a myriad of situations, these investors and shareholders would be able to maintain an action to recover the purchase price of drugs distributed through legitimate distribution chains. The Eleventh Circuit's ownership test for constructive possession would impose criminal liability upon these investors and shareholders upon maturity of

this abstract cause of action.[6]

The Eleventh Circuit's ownership test for constructive possession also poses complex and unnecessary problems for law enforcement agencies and courts administering federal drug laws, most of which hinge upon an element of possession. As in the case of distribution, both courts and law enforcement agents normally rely upon a factual, bright line test to determine possession. In cases where a defendant is in direct physical contact with drugs, a determination of actual possession is un-

---

[6] In 21 U.S.C. §822(c)(1), Congress expressly precluded criminal liability for agents and employees of registered drug distributors. However, since constructive possession of drugs has always hinged upon an actual ability to control or direct the disposition of such drugs and not upon the existence of an abstract cause of action for the purchase price of drugs, there is no statutory bar to the criminal liability of investors and shareholders in registered drug businesses upon the vesting of such a cause of action.

problematic. Constructive possession, though more problematic, previously has always hinged upon a factual determination that an individual had an actual ability to exercise dominion and control over drugs and to direct their disposition. The opinion below plunges this settled area of law into uncertainty.

Though the Eleventh Circuit ostensibly formulated an ownership test for constructive possession, its application of that test to the instant facts departed from all traditional notions of ownership. The Uniform Commercial Code §2-401(2), consistent with the common law, provides that title to goods passes at the time and place at which the seller completes his performance and physically delivers the goods. Since BRUNTY physically delivered the marijuana to the government agents in the Southern District, where the marijuana had been stored, the government agents and not

BRUNTY "owned" the marijuana upon returning to the Middle District.

Instead of adhering to traditional notions of ownership, the Eleventh Circuit equated ownership of drugs with the existence of a cause of action for the purchase price of the drugs.[7] The Eleventh Circuit, however, noticeably glossed over the difficulties of its approach.

Causes of action for the purchase price of goods normally arise under state law.

---

[7] Even under the "cause of action" test for constructive possession, BRUNTY did not have constructive possession of marijuana in the Middle District of Florida. Under the terms of BRUNTY's oral agreement with the undercover agents, the agents were not to tender payment until the parties arrived at their destination in the Middle District. Upon arrival at that destination, BRUNTY was immediately arrested. Since the agents did not breach their agreement with BRUNTY until after BRUNTY's arrest, BRUNTY's theoretical cause of action for the purchase price of the marijuana never matured prior to the arrest.

If federal possessory offenses hinge upon the often discordant laws of the various states, the same acts would constitute federal offenses in some states but not in others. This problem is severely aggravated by the multitude of legal concepts which affect such causes of action, including waiver, estoppel, limitations, statute of frauds, capacity, and duress. If, on the other hand, the existence of a cause of action for the purchase price of drugs is to be determined by an as yet unspecified and undeveloped body of federal law, federal possessory offenses would be rendered unconstitutionally vague.

C. Constructive Possession as "Steps" to Exercise Control Over Drugs.

The third facet of the Eleventh Circuit's opinion, the ruling that constructive possession is present when an individual "takes steps" to retain (or obtain) control of

drugs, also introduces complex and unnecessary problems into a previously well-settled area of law. As discussed above, constructive possession previously has hinged upon a finding that an individual had an actual ability to exercise dominion and control over drugs and to control their disposition. The Eleventh Circuit abandoned this well-established standard in favor of a less stringent standard requiring only that "steps" be taken in an attempt to exercise control over drugs. The Eleventh Circuit, however, does not suggest what "steps" are necessary to establish constructive possession.

If such "steps" must at least satisfy the traditional concept of attempt, then the Eleventh Circuit's ruling renders 21 U.S.C. §846 superfluous. Alternately, if the requisite "steps" need not amount to an attempt, individuals could be guilty of substantive

possessory offenses under facts insufficient to constitute an attempt to commit such offenses. In short, the Eleventh Circuit's ruling leaves law enforcement agents, courts, and the public guessing as to the nature of possessory offenses.

These compelling problems justify the grant of certiorari to review the opinion below.

C O N C L U S I O N

The three independent facets of the Eleventh Circuit's opinion fundamentally alter previously well-settled principles concerning distribution and other possessory offenses and conflict with the rulings of every federal circuit court which has considered those issues. The opinion below expands liability and venue for drug offenses beyond any bounds anticipated by Congress or the courts. The opinion fundamentally alters the nature of distribution offenses and impacts upon every federal law containing possession as an element of an offense. The Eleventh Circuit's radical departures from established and time-tested principles create severe practical problems for law enforcement agencies and impinge upon various constitutional protections.

In the thirteen years since the enactment of the Comprehensive Drug Abuse Preven-

tion and Control Act of 1970, this Court has addressed neither the nature of a distribution offense nor the key element of "possession." This Court's intervention is necessary to guide the various circuits concerning the proper application of the federal distribution statute and related possessory offenses as well as to prevent grossly discordant rulings between the circuits.

For the reasons stated herein, this Court should grant a writ of certiorari to review the opinion below.

Respectfully submitted,

A. THOMAS MIHOK, ESQUIRE
DEMPSEY & SLAUGHTER, P.A.
Suite 610, Day Building
Post Office Box 1980
Orlando, Florida 32802
(305) 422-5166

Attorneys for Petitioner,
CHARLES W. BRUNTY

CASE NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHARLES W. BRUNTY, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

A P P E N D I X
TO
PETITION FOR A WRIT OF CERTIORARI

CONTENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6000

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CHARLES W. BRUNTY,

Defendant-Appellant.

Appeal from the United States
District Court
for the Middle District of Florida

April 4, 1983

Before VANCE and ANDERSON, Circuit Judges, and SCOTT*, District Judge.

CHARLES R. SCOTT, District Judge:

Appellant, Charles W. Brunty, was convicted of conspiracy to distribute marijuana, in violation of 21 U.S.C. §846, and of distribution of approximately 530 pounds of marijuana, in violation of 21 U.S.C. §841(a)(1). On appeal, Brunty contends that the trial court's voir dire examination of prospective jurors was inadequate, and that venue in the Middle District of Florida as to the distribution count was improper. For the reasons set forth below we find both contentions lacking in merit and accordingly affirm.

Brunty's conspiracy and distribution convictions arose out of his attempt to sell a large quantity of marijuana to Rick Look, an undercover agent with the Florida Department of Law Enforcement. The transaction between

Brunty and Look was arranged by a co-conspirator named Robert Malley.[1] Look, who was posing as a buyer from Detroit, Michigan, agreed to purchase 500 pounds of marijuana from Brunty at a price of $250 per pound.

Look and Brunty first met on the night of April 7, 1981 at the Mousetrap Lounge in Cocoa Beach, Florida. Also present were Malley and an informant named Peter Myers. At that time the transaction was discussed. Brunty told Look that it was a two or three hour drive to where the marijuana was located. It was agreed that Look would accompany Brunty to obtain the marijuana on the following day.

At about 12:00 o'clock Noon on April 8, 1981, Look, driving a Cadillac with

---

[1] Robert Malley was employed as a United States Customs Patrol Officer prior to his arrest. Malley pled guilty to the conspiracy charge.

$125,000 proposed purchase money in the trunk, another undercover agent, Mike Morris, driving a van,[2] and Brunty, driving a Ford Pinto, met in the parking lot of the Denny's restaurant in Merritt Island, Florida.[3] Pursuant to Brunty's request, Look opened his trunk and showed Brunty the $125,000, contained in a brown paper sack.

The three thereafter proceeded south,

---

[2] Morris, an agent with Orlando Police Department, was assigned to the Federal Drug Enforcement Administration Task Force in Orlando during this period. The van was an undercover vehicle owned by the Florida Department of Law Enforcement.

[3] Cocoa Beach and Merritt Island are in Brevard County, in the Middle District of Florida.

Brunty and Look in Brunty's Pinto[4] with Morris following in the van. Upon arriving at the Denny's restaurant in Delray Beach, Florida, at about 3:15 P.M., they met two others, Jeffery Arnold and Hubert Yonn, who were also charged in the conspiracy.[5] Brunty, Arnold, Look and Morris then rode in the van following Yonn to a mini-warehouse in Boca Raton, Florida[6] where the Marijuana was stored. Sev-

---

[4] Along the way, Brunty spoke to Look about his close personal and business relationship with Malley and stated that Malley was to receive a commission for arranging the deal. Brunty also claimed to have smuggled loads of marijuana from Colombia [sic] for three years by using fishing boats.

[5] Arnold was Brunty's co-defendant at trial. "Huey" Yonn is currently a fugitive.

[6] Delray Beach and Boca Raton are in Palm Beach County, in the Southern District of Florida.

eral bales of marijuana were loaded into the van. The party then returned to Delray Beach, Yonn taking Brunty and Arnold in his car with Look and Morris following in the marijuana-laden van. At Delray Beach they stopped at a Woolco department store, next to the Denny's restaurant where Brunty had left his Pinto, and bought some blankets which were used to cover the marijuana in the van. From there Brunty arranged that he would drive Look back to Merritt Island in the Pinto, with Morris following alone in the Van. On the way back, Brunty pulled into a gas station and Morris followed. Brunty gassed up the van and paid for the gas.

The two vehicles arrived back at the Denny's in Merritt Island at about 8:00 o'clock that evening. Brunty then accompanied Look to Look's car hoping to get the purchase money. Instead, he got arrested.

Voir Dire

Appellant contends that the trial court's restrictions on voir dire questioning of prospective jurors deprived him of his Sixth Amendment right to be tried by an impartial jury. Prior to trial, Brunty moved the court to permit counsel to conduct voir dire, or alternatively, to have the court propound a list of specific questions to the prospective jurors. The asserted purpose of the motion was to discover bias against persons charged with drug-related crimes for purposes of challenges for cause and effective use of peremptory challenges. The trial court denied Brunty's motion but agreed to ask 34 of the 204 questions Brunty submitted. Brunty requested that 73 of the proffered questions be heard by each juror in isolation. The court asked only three of these, but not to isolated veniremen.

[1, 2] Rule 24(a) of the Federal Rules of Criminal Procedure vests in the trial court broad discretion to determine the appropriate method and scope of voir dire. This discretion extends to the decision whether to propound questions proffered by counsel, United States v. Holman, 680 F.2d 1340, 1345 (11th Cir. 1982); United States v. Brooks, 670 F.2d 148, 152 (11th Cir.), cert. denied, ____ U.S. ____, 102 S.Ct. 2943, 73 L.Ed.2d 1339 (1982); United States v. Magana-Arevalo, 639 F.2d 226, 228 (5th Cir. 1981), and whether jurors should be questioned collectively or individually. United States v. Colacurcio, 659 F.2d 684, 689 (5th Cir. 1981), cert. denied, 455 U.S. 1002, 102 S.Ct. 1635, 71 L.Ed.2d 869 (1982); United States v. Hawkins, 658 F.2d 279, 283 (5th Cir. 1981); United States v. Delval, 600 F.2d 1098, 1102 (5th Cir. 1979). An abuse of discretion will not

be found if the method of voir dire adopted by the trial court is capable of giving reasonable assurance that prejudice would be discovered if present. United States v. Brooks, supra; United States v. Hawkins, supra; United States v. Delval, supra.

[3, 4] An examination of the record reveals that the district court did not abuse its discretion. The questions propounded by the court adequately covered those matters which the defendants had a legitimate interest in bringing out, and were clearly sufficient to assure that prejudice against the defendant due to his being charged with narcotics viola-

tions would be uncovered.[7] See United States v. Rojas, 537 F.2d 216, 219 (5th Cir. 1976), cert. denied, 429 U.S. 1061, 97 S.Ct. 785, 50 L.Ed.2d 777 (1977); United States v. Eastwood, 489 F.2d 818, 819-20 (5th Cir. 1973). We note that many of the defendant's proposed questions, particularly among those he wanted to have asked in camera, were plain-

---

[7] Indeed, the court's questioning into possible bias due to the nature of the charges prompted seven jurors to indicate that they would or could possibly be prejudiced. All seven were then summarily excused. Appellant's claim that there may have been others is sheer speculation which this court need not entertain.

It is also worth noting that with respect to one juror whose son had been charged with a drug offense earlier, Brunty's counsel opposed the government's request that the juror be questioned further, stating that the juror "said he could follow the instructions of the court and did so under oath, and he could do it impartially" (Record, vol. II, p. 106). The questions propounded to that juror were substantially identical to the inquiry made of all the other jurors.

ly aimed at determining -- and perhaps influencing -- the views of jurors on the propriety of the marijuana laws.[8] A defendant is not entitled to a sympathetic jury; merely an impartial one. See generally 2 Wright, Federal Practice and Procedure: Criminal 2d §381. Since jurors are not at liberty to disregard the law in arriving at their verdict, a trial judge owes no obligation to a defendant to

---

[8] Some examples were:

139. Would you be willing to turn a relative, such as your child, over to the police if you discovered if he or she was using marijuana?

* * * * * *

144. In your own words, how do you feel about drugs? Drug users? People who make a living distributing drugs?

* * * * * *

162. Would you approve of your children drinking alcoholic beverages but not approve of their smoking marijuana?

* * * * * *

169. Do you see any similarity between marijuana being illegal and the days of prohibition?

inquire into whether jurors agree with the law.[9] Essential fairness was satisfied in this case by the district court's careful though general questions pertaining to the possibility of bias against the accused due to the nature of the charges. United States v. Rojas, supra; United States v. Eastwood, supra.

[5] We also hold that the district court did not abuse its discretion in declin-

---

[9] Brunty's counsel has candidly admitted, in arguments before the trial court and on appeal, that his purpose was to uncover "deep-seated prejudices" of prospective jurors against "the use of marijuana" and "drug offenses." (Record, vol. II, p. 7; Reply Brief, p. 1). We feel this use of the word "prejudice" is merely a euphemism for saying that prospective jurors might support the laws which prohibit such activities. While a defendant is entitled to discover whether the charges against him would prevent a juror from giving him a fair trial, he is not entitled to learn whether the juror agrees with the laws upon which those charges are based.

ing to question the jurors in isolation. Such a procedure is not required in cases involving unsupported general allegations of prejudicial information. See United States v. Colacurcio, 659 F.2d at 689; United States v. Hawkins, 658 F.2d at 283-85; United States v. Gerald, 624 F.2d 1291, 1297 (5th Cir. 1980), cert. denied, 450 U.S. 920, 101 S.Ct. 1369, 67

L.Ed.2d 348 (1981).[10]

Venue

[6] Appellant contends that his con-

---

[10] Appellant also challenges the district court's denial of his motion to strike the remaining jurors on the panel, or alternatively to direct specific questions to each, because they were present when the court dismissed the seven prospective jurors referred to in note 7, supra, and had heard certain remarks made by those dismissed jurors concerning their possible prejudice. The record shows that three jurors mentioned relationships they had with children, and one juror stated that his son returned from Viet Nam in "pretty bad shape." (Record, vol. II, p. 89-91). However, each of these remarks was extremely brief and unspecific, the trial judge having immediately cut off any juror who attempted a detailed explanation. We cannot say under the circumstances that the district court abused its discretion in declining to strike the remaining jurors or to voir dire them specifically about the remarks of the dismissed jurors. What minimal statements the remaining jurors heard can hardly be considered spectacular or inflamatory, compare United States v. Gibbons, 607 F.2d 1320, 1330-31 (10th Cir. 1979), and had no connection with the defendant or the case being tried. Brunty's counsel did not request a specific cautionary instruction. We feel that the trial court's general questioning and jury instructions were reasonably sufficient to discover or eradicate any resulting prejudice.

viction for distribution of marijuana should be reversed because the Middle District of Florida lacked proper venue. At the close of the government's case-in-chief,[11] Brunty moved for a judgment of acquittal[12] on the contention that the distribution occurred in the Southern District of Florida, not in the Middle District as charged. It was undisputed that the actual physical transfer of marijuana into Agent Morris's van occurred in Palm Beach County, in the Southern District of Florida.

---

[11] The government does not challenge the timeliness of appellant's venue objection.

[12] Although referred to in cases as a motion for "judgment of acquittal," e.g., United States v. White, 611 F.2d 531, 534 (5th Cir.), cert. denied, 446 U.S. 992, 100 S.Ct. 2978, 64 L.Ed.2d 849 (1980), if such a motion were granted solely due to improper venue, the government would not be prevented from retrying the case in a proper district. See United States v. Stratton, 649 F.2d 1066, 1076-79, 1083 (5th Cir. 1981).

The district court, nonetheless, denied Brunty's motion, holding that the jury could reasonably conclude that Brunty's distribution was a continuing offense, part of which occurred in Brevard County, in the Middle District of Florida, and that Brunty retained constructive possession of the marijuana pending receipt of payment in the Middle District.[13]

The right of a criminal defendant to be tried in the state and district in which the crime was committed is guaranteed by Article III of and the Sixth Amendment to the United States Constitution and Rule 18 of the

---

[13] We observe sua sponte that the district court erred, to the defendant's advantage, in failing to instruct the jury that the government need only establish proper venue by a preponderance of evidence, not by proof beyond a reasonable doubt. United States v. Wuagneux, 683 F.2d 1343, 1356-57 (11th Cir. 1982); United States v. Rivamonte, 666 F.2d 515, 517 (11th Cir. 1982).

Federal Rules of Criminal Procedure. This right, however, is qualified under 18 U.S.C. §3237(a), which provides that an offense "begun in one district and completed in another, or committed in more than one district, may be ... prosecuted in any district in which such offense was begun, continued, or completed."

Appellant urges us to hold that his distribution was not a continuing offense. To this end he asks that we narrowly construe the term "distribution" in 21 U.S.C. §841(a) to mean nothing more or less than "the transfer of possession," and in particular that we distinguish "distribution" from "sale." Brunty alleges that he fully relinquished possession of the marijuana in Boca Raton, in the Southern District of Florida, notwithstanding the fact that he was not to receive payment until he had driven Agent Look back to the Denny's in Merritt Island, in the Middle District of

Florida. Appellant contends that while such acts might properly be considered part of a "sale," they should not be viewed as part of a "distribution."

Appellant's proposed narrow construction of "distribution" is without basis. Section 841(a) was enacted as part of the Comprehensive Drug Abuse Prevention & Control Act of 1970. 21 U.S.C. §801 et seq. The Act defines "distribute" to mean "deliver," and "deliver" to mean "the actual, constructive, or attempted transfer of a controlled substance, whether or not there exists an agency relationship." 21 U.S.C. §802(8) and (11). Conspicuously, the operative term "transfer" is nowhere qualified or limited, by the phrase "of possession" or otherwise. This omission no doubt was purposeful, since the legislative history of the statute clearly reveals that Congress intended "distribution" to contem-

plate "sale." 1970 U.S. Code. Cong. & Ad. News 4566, 4574-76. See also 21 U.S.C. §841 (b)(4).[14]

[7] Cases involving distribution under §841(a) support a broad construction of the offense. The Fifth Circuit has acknowledged that "distribution" is broader in scope than the predecessor offense of "sale," United States v. Workopich, 479 F.2d 1142, 1147 n. 6

---

[14] Section 841(b)(4), Title 21, provides that any person who violates §841(a) "by distributing a small amount of marijuana for no remuneration" shall be treated and sentenced under 21 U.S.C. §844, as if his offense were merely simple possession. (Emphasis added). By implication, one who distributes the same amount of marijuana for remuneration does not fall within this exception, and accordingly is sentenced as a distributor under the more severe provisions of 21 U.S.C. §841(b)(1)(B).

(5th Cir. 1973),[15] and has stated that the crime is defined broadly enough "to include acts which perhaps traditionally would have been defined as mere aiding and abetting." United States v. Oquendo, 505 F.2d 1307, 1310 n. 1 (5th Cir. 1975). More generally, the distribution provision has been held to criminalize "participation in the transaction viewed as a whole." United States v. Pruitt, 487 F.2d 1241, 1245 (8th Cir. 1973); United States v. Wigley, 627 F.2d 224, 226 (10th Cir. 1980). Such participation may consist of or include

---

[15] See also Kitchen v. United States, 532 F.2d 445 (5th Cir. 1976) (habeas venue challenge to conviction for distribution in violation of §841(a), rejected where "there is ample proof that the drugs were sold in the [district where the defendant was tried]" (emphasis added)), and United States v. Felts, 497 F.2d 80, 82 (5th Cir.), cert. denied, 419 U.S. 1051, 95 S.Ct. 628, 42 L.Ed.2d 646 (1974) (§841(a) distribution conviction affirmed following United States v. Spence, 425 F.2d 1079 (5th Cir. 1970), which involved predecessor offense of "sale").

the transfer of actual possession, e.g., United States v. Pool, 660 F.2d 547, 561 (5th Cir. 1981), or the transfer of constructive possession. E.g., United States v. Ramos, 666 F.2d 469, 475-76 (11th Cir. 1982); United States v. Felts, 497 F.2d 80, 82 (5th Cir.), cert. denied, 419 U.S. 1051, 95 S.Ct. 628, 42 L.Ed.2d 646 (1974). However, distribution may also consist of or include other acts perpetrated in furtherance of a transfer or sale, such as arranging or supervising the delivery, or negotiating for or receiving the purchase price. See United States v. Ramos, 666 F.2d at 475-76; United States v. Wigley, 627 F.2d at 225-26; United States v. Witt, 618 F.2d 283, 284-85 (5th Cir.), cert. denied, 449 U.S. 882, 101 S.Ct. 234, 66 L.Ed.2d 107 (1980); United States v. Chester, 537 F.2d 173 (5th Cir. 1976), cert. denied, 429 U.S. 1099, 97 S.Ct. 1120, 51 L.Ed.2d 548 (1977); United States v. Oquendo, 505 F.2d at 1309-10;

United States v. Felts, 497 F.2d at 82; cf. United States v. Davis, 564 F.2d 840, 844-45 (9th Cir. 1977), cert. denied, 434 U.S. 1015, 98 S.Ct. 733, 54 L.Ed.2d 760 (1978); see also United States v. Wilson, 657 F.2d 755, 761-62 (5th Cir. 1981), cert. denied, 455 U.S. 951, 102 S.Ct. 1456, 71 L.Ed.2d 667 (1982).

[8] The evidence in this case, viewed in the light most favorable to the government, unquestionably supports the finding of a continuous sales transaction between Brunty as seller and Agent Look as buyer and that Brunty performed acts in furtherance of that sale in the Middle District of Florida both prior and subsequent to his acts in the Southern District of Florida. Brunty's prior participation included discussing and making arrangements for the delivery and sale, inspecting the proposed purchase money, and departing from Merritt Island for the purpose of re-

trieving the marijuana. Brunty's participation after leaving the Southern District of Florida included his efforts to collect the purchase money. These acts comfortably support the charge that Brunty distributed the marijuana in the Middle District of Florida. See United States v. Ramos, supra; United States v. Oquendo, supra; United States v. Felts, supra; United States v. Chester, supra.

Appellant argues that because he could have been convicted of distribution in the Southern District of Florida for the acts he performed there, his crime must be viewed as completed prior to his return to the Middle District. However, as we have emphasized, the relevant test is not whether distribution was committed in the Southern District, but whether the transaction viewed as a whole was completed in the Southern District. Because the evidence shows that Brunty expected pay-

ment upon his return to Merritt Island, it was proper for the jury to view Brunty's offense as continuing into the Middle District of Florida.[16] Our conclusion is reinforced by a line of cases involving importation of narcotics, in violation of 21 U.S.C. §952(a), which hold that although the crime is committed the moment the narcotics enter the United States, it continues and is not completed until the narcotics reach their point of destination, and consequently venue lies in any district along the way. United States v. Phillips, 664 F.2d 971, 1031 (5th Cir. 1981), cert. denied sub nom., Platshorn v. United States, ____ U.S. ____, 103 S.Ct. 208, 74 L.Ed.2d 166 (1982); United States v. Gray, 626

---

[16] Brunty's argument, of course, also ignores his participation in the distribution in the Middle District of Florida prior to his acts in the Southern District of Florida.

F.2d 494, 497-98 (5th Cir. 1980), cert. denied, 449 U.S. 1091, 101 S.Ct. 887, 66 L.Ed.2d 820 (1981), and sub nom., Wright v. United States, 449 U.S. 1038, 101 S.Ct. 616, 66 L.Ed.2d 500 (1980); Barker v. United States, 450 U.S. 919, 101 S.Ct. 1367, 67 L.Ed.2d 346 (1981); United States v. Godwin, 546 F.2d 145 (5th Cir. 1977); United States v. Jackson, 482 F.2d 1167 (10th Cir. 1973), cert. denied, 414 U.S. 1159, 94 S.Ct. 918, 39 L.Ed.2d 111 (1974).

[9-11] Additionally, we reject appellant's claim that the jury could not reasonably have found that he retained constructive possession over the marijuana during the return drive to Merritt Island, which possession he did not intend to relinquish until he received payment. Constructive possession may be shown by ownership, dominion or control over the contraband itself, or dominion or

control over the premises or the vehicle in which the contraband was concealed. United States v. Davis, 679 F.2d 845, 852-53 (11th Cir. 1982); United States v. Marszalkowski, 669 F.2d 655, 662 (11th Cir. 1982); United States v. Glasgow, 658 F.2d 1036, 1043 (5th Cir. 1981). Constructive possession may be shared with others. United States v. Davis, 679 F.2d at 853; United States v. Ramos, 666 F.2d at 476. The record shows not only that Brunty had "ownership" of the marijuana (in the sense that had the sale been lawful, he could have maintained an action for the contract price), but that Brunty intended, and took steps, to retain control over the marijuana and Agent Morris's van until receiving

payment.[17] Accordingly, even viewing "distribution" as "a transfer of possession," the evidence supports a finding that Brunty's release of constructive possession was not to occur until receipt of payment, in the Middle District of Florida. On this theory, the fact that Brunty was arrested before payment was completed is of no consequence, since an "at-

---

[17] Aside from issuing numerous instructions to Agents Look and Morris, Brunty's efforts arguably in furtherance of retaining control of the marijuana until collecting payment include his inspecting the purchase money before departing, his keeping close watch on Look while in the Woolco department store, his arrangements to have Look ride back with him in the Pinto rather than in the van with Morris, his buying gas for the van, his keeping the van within sight during the drive, and his accompanying Look back to Look's car upon returning to Merritt Island.

Whether actual drug purchasers might have been less cooperative with Brunty is immaterial in our view. By the same token, it is of no legal significance that Look and Morris were in fact government agents. See United States v. Boney, 572 F.2d 397, 402 (2d Cir. 1978).

tempted transfer" satisfies the offense. 21 U.S.C. §802(8); see United States v. Tamargo, 672 F.2d 887, 890-91 (11th Cir. 1982).

For the foregoing reasons, the appellant's convictions on both counts are

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6000

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES W. BRUNTY,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING

( )

Before VANCE and ANDERSON, Circuit Judges, and SCOTT, District Judge. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and num-

bered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge